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IN THE

Supreme Court of the United States

October Term, 1963

No. 50

MORRIS GOTTHILF,

Petitioner,

against

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

On Writ of Certiorari to the
NEW YORK SUPREME COURT
Appellate Division, First Judicial Department

PETITIONER'S BRIEF

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On Writ of Certiorari to the NEW YORK SUPREME COURT Appellate Division, First Judicial Department

PETITIONER'S BRIEF

Opinions Below

The New York Appellate Division, First Department, rendered no opinion. The Supreme Court, New York County, rendered two memorandum opinions, one on February 15, 1962 (R. 44) and a second on March 14, 1962 (R. 45). These opinions are not reported.

Jurisdiction

The final order of the New York Appellate Division, First Department, was entered on September 20, 1962 (R. 46). Thereafter the petitioner sought to appeal to the New York Court of Appeals as of right pursuant to §588(1)(a) of the New York Civil Practice Act on the ground that §764 of the Civil Practice Act as applied in the instant case violated the Fourteenth Amendment's due process clause. The respondents moved to dismiss the appeal. On November 1, 1962 the New York Court of Appeals granted the motion "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution" (R. 48). The petition for a writ of certiorari was filed on December 19, 1962 and granted on April 1, 1963 (R. 49; 372 U. S. 957). The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

Constitutional and Statutory Provisions Involved

1. United States Constitution, Fourteenth Amendment, §1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. New York Civil Practice Act, §764:

> "*Issuance of execution against the person generally.* Subject to the exception specified in the next section,

an execution against the person of a judgment debtor may be issued by the court or a judge or justice thereof, upon application by the judgment creditor, in a case where the judgment can be enforced by execution, as prescribed by section five hundred and four of this act, and where the plaintiff's right to arrest the defendant depends upon the nature of the action. The issuance of the execution shall rest in the discretion of such court, judge or justice. The application for the issuance of the execution may be made without notice, or with such notice as the court, judge or justice may direct, and shall be made by affidavit which shall set forth in detail the right of the party to the execution, the amount of the judgment, the amount unpaid, and the time when and place where the execution against the judgment debtor's personal property has been returned wholly or partially unsatisfied."

3. New York Civil Practice Act, §504:

"*Enforcement of judgment by execution.* In either of the following cases a final judgment may be enforced by execution:

"1. Where it is for a sum of money in favor of either party; or directs the payment of a sum of money. * * *"

4. New York Civil Practice Act, §826:

"*Right to arrest depending upon the nature of the action.* A defendant may be arrested in an action, as provided in this and the next article, where the action is brought for either of the following causes:

1. To recover a fine or penalty.

2. To recover damages for a personal injury.

3. To recover damages for an injury to property, including the wrongful taking, detention or conversion of personal property.

4. To recover damages for misconduct or neglect in office, or in a professional employment.

5. To recover damages for fraud, or deceit.

6. To recover a chattel where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff * * *.

7. To recover for money received * * * [as a result of embezzlement or fraudulent misapplication by a public official or other fiduciary].

8. To recover * * * [public funds converted by the defendant].

9. In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in * * * incurring the liability, or that, since the making of the contract * * * he has removed or disposed of his property with intent to defraud * * *."

5. The New York Correction Law, §515, contains that State's "jail liberties" provision:

"A person in the custody of a sheriff, by virtue of an order of arrest; or of an execution in a civil action; or in consequence of a surrender in exoneration of his bail; is entitled to be admitted to the liberties of the jail, upon delivering to the sheriff an approved undertaking as prescribed in section five hundred and seventeen of this chapter."

6. Section 517 of the Correction Act provides in part:

> "The undertaking must be executed * * * in a penalty at least twice the sum * * * directed to be collected by the execution, if he is in custody under an execution * * *. Within two days after the approval by the court, judge or county judge, the undertaking must be filed * * * and a copy delivered to the party at whose instance the prisoner was in custody * * * who shall within three days thereafter serve * * * a notice that he does not accept * * * [the surety or sureties] as bail; otherwise he is deemed to have accepted them * * *. [There follows a provision for justification of bail and/or new bail.] This section applies to a civil prisoner only."

7. Section 72 of the Civil Rights Law imposes limits on the duration of a person's imprisonment pursuant to execution:

> "No person shall be imprisoned within the prison walls of any jail for a longer period than three months under an execution or any other mandate against the person to enforce the recovery of a sum of money less than five hundred dollars in amount * * * and where the amount * * * is five hundred dollars or over, such imprisonment shall not continue for a longer period than six months * * *. In computing the term of imprisonment time spent within the prison walls of any jail and time spent within the jail liberties shall be included * * *."

Question Presented

Does §764 of the New York Civil Practice Act, providing for body execution, as applied in the instant case simply to enforce collection of a debt, violate the due process clause of the Fourteenth Amendment of the United States Constitution?

Statement of the Case

The respondents seek a body execution "pursuant to Article 44 and Sec. 826 of the Civil Practice Act" (R. 4), against the petitioner Morris Gotthilf on a final judgment which resulted from a mistaken default order. Mr. Justice Abraham J. Gellinoff by an order entered at the Office of the Clerk of the Supreme Court, New York County, on March 26, 1962 allowed in all respects the motion of the respondents for body execution (R. 3-4). The Appellate Division, First Judicial Department, by an order entered in the office of the Clerk of that Department on September 20, 1962 affirmed Mr. Justice Gellinoff's order without opinion (R. 46). The New York Court of Appeals on November 1, 1962 sustained a motion of the respondents to dismiss the petitioner's appeal to that Court "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution" (R. 48).

In June 1960 Benjamin Sills, Morton Sills and Sills of Cambridge, Inc., brought suit against Charge-It Systems, Inc., and Morris Gotthilf, alleging fraudulent representations on the part of the defendants to the damage of the corporate plaintiff (R. 25-38). The defendants answered,

denying any fraudulent representations on their part; and setting up affirmative defenses and counterclaims which charged fraudulent representations on the part of the plaintiffs to the damage of the corporate defendant (R. 38-43).

On November 17, 1960 Mr. Justice Jacob Markowitz entered a default order against both defendants (R. 11). When it was discovered that the default order was against the individual defendant Morris Gotthilf, as well as the corporate defendant Charge-It Systems, Inc., the then attorney for the defendants, Archibald Palmer, Esq., made a motion to set aside the default, but this motion was denied in an order which was filed on March 10, 1961 (R. 11).

On May 9, 1961 Mr. Justice George M. Carney ordered a judgment in favor of the corporate plaintiff and against the defendants in the sum of $17,408.77 together with interest and costs; and on May 24, 1961 the clerk entered judgment in the amount of $17,408.77 plus interest in the amount of $1,697.36 and costs and disbursements of $188.25 for a total of $19,294.38 (see R. 5).

Thereafter Mr. Palmer unfortunately added to his first mistake a second error: he failed to specify in his notice of appeal to the Appellate Division, First Department, the order of March 10, 1961 denying the motion to set aside the default order against the individual defendant Morris Gotthilf. The plaintiffs in their brief in the Appellate Division now made the point that "the individual defendant, Gotthilf, having failed to appeal from the order denying his motion to vacate his default, the appeal taken herein is unauthorized and in violation of Section 557 of the Civil Practice Act." The Appellate Division affirmed without opinion. 15 A. D. 2d 458 (1961).

The charges and countercharges in this case have been extreme. Despite them, however, certain facts which are undisputed nevertheless emerge. The plaintiff corporation and the defendant corporation entered into a factoring agreement under which the defendant corporation as factor made large advances to the plaintiff corporation. On September 22, 1959 there was due under this factoring arrangement from the corporate plaintiff to the corporate defendant the sum of $22,768.39, for which the corporate defendant held as collateral, accounts receivable of $28,319.28 (R. 32). The figure of $28,319.28 included accounts of doubtful and disputed collectibility amounting to some $23,000.00 (R. 11). The existence of this worthless collateral plus the threat that the plaintiff would go into bankruptcy, induced the corporate defendant to settle the amount of $22,768.39 due it for $13,000.00, thereby sustaining a loss of some $9,500.00 (R. 11).

It is equally clear that everything which the defendant Morris Gotthilf did, he did in his representative capacity as chairman of the board of the corporate defendant, Charge-It Systems, Inc. (R. 13, 19). Moreover, there is no allegation in the instant complaint that the individual defendant Morris Gotthilf acted with malice or personally profited as a result of the alleged fraudulent acts (see R. 25-31). On the contrary, the complaint makes plain that Morris Gotthilf acted only on behalf of the corporate defendant. For instance, the complaint alleges in paragraph Eighth that "the Corporate Defendant, acting through Gotthilf, entered into an agreement with plaintiffs" (R. 26). On such allegations the individual defendant should not have been held liable. See, for example, *Potter* v. *Minskoff*, 4 N. Y. 695 (1958), 171 N. Y. S. 2d 88, 148 N. E. 2d

303, *affirming* 2 A. D. 2d 513, 156 N. Y. S. 2d 872 (4th Dept. 1956); *Matter of Brookside (Raybrook Textile Corp.)*, 276 App. Div. 357, 94 N. Y. S. 2d 509 (1st Dept. 1950); *Lukach* v. *Blair*, 108 Misc. 20, 178 N. Y. Supp. 8 (Sup. Ct. N. Y. Co. 1919), *aff'd*, 192 App. Div. 957 (1st Dept. 1920); *Hicks* v. *Haight*, 171 Misc. 151, 11 N. Y. S. 2d 912 (Sup. Ct. Nassau Co. 1939).

As to the default entered against both defendants, their then attorney, Mr. Palmer, swears that he thought he had an understanding with counsel for the plaintiffs that judgment would be entered against the corporate defendant only:

> "6. Prior to the scheduled time of the examination before trial of the defendants on October 27, 1960, deponent called the office of the attorney for the plaintiffs to obtain an adjournment of said examination due to his engagement in another matter at the scheduled time for the examination. Deponent was unable to reach plaintiffs' attorney at that time, and later in the morning deponent received a call from the office of plaintiffs' attorney and spoke to an individual whom he assumed to be Mr. Theodore Charnas. Deponent discussed the matter with said attorney and advised him that in view of the fact that the corporate defendant was insolvent and that it had been shown to said attorney that the individual defendant was not personally responsible, deponent would be willing to have judgment entered against the corporate defendant alone, and would thereupon abandon the counterclaims interposed in the verified amended answer. It was deponent's understanding that said attorney agreed to this proposal and that the matter was to be disposed of in this manner.

"7. Deponent thereafter proceeded upon the assumption that the motions made by the attorney for the plaintiffs were based upon this agreement and that said attorney was merely proceeding to enter judgment against the corporate defendant. It was not until deponent was served with a copy of the order signed by the Hon. Aron Steuer ganting judgment herein and setting down the matter for inquest on February 9, 1961, together with a notice of inquest which indicated that the plaintiffs were seeking execution against the person of the individual defendant herein, that deponent realized that plaintiffs' attorney had proceeded against the individual defendant as well as the corporation, contrary to his understanding with said attorney.

"8. Upon receiving these documents, deponent communicated with the attorney for the plaintiffs and inquired why said attorney had disregarded the agreement upon which deponent had permitted plaintiff's attorney to note a default in connection with the examination before trial originally scheduled for October 27, 1960. Deponent advised Mr. Theodore Charnas that in view of the fact that there were bona fide issues of fact involved in this action he could not possibly have consented to judgment against the individual defendant. Mr. Theodore Charnas replied that he had not personally handled the entry of the judgment herein and the proceedings subsequent thereto, and therefore was unable to answer deponent's inquiry. When deponent requested that Mr. Charnas vacate the judgment against the individual defendant, he was advised to make a motion for such relief.

"9. It appears from the order of the Honorable Jacob Markowitz dated November 16, 1960 that the plaintiffs' motion to strike the amended answer and counter-claims of defendants was granted upon the

representation of the counsel for plaintiffs that the defendants' counsel informed him that defendants had abandoned this case. As hereinabove shown, this representation was, at the very least, based upon a misunderstanding on the part of plaintiffs' counsel with respect to the statements made to him by deponent on October 27, 1960, and it was never deponent's intention to abandon the defense of the action against the individual defendant herein. It is apparent that since deponent had prepared a verified answer in this proceeding which raised bona fide issues of fact, he could never have consented to the entry of a default judgment against the individual defendant. In this connection I call to the Court's attention, as I have indicated at the outset in this affidavit, that the defendant Morris Gotthilf was not individually liable for the acts alleged in the complaint. Everything that Morris Gotthilf did, he did in a representative capacity as chairman of the Board of Directors of the corporate defendant. Accordingly, any liability running to the plaintiffs was from the corporate defendant and not from the individual defendant Morris Gotthilf." (R. 16-19)

Thus it happened that Morris Gotthilf never had his day in court. If he had had his day, he could have shown not only that everything he did, he did in a representative capacity as chairman of the board of directors of the corporate defendant; but also demonstrated the worthlessness of the accounts receivable that served as collateral for the advances from the corporate defendant to the corporate plaintiff. He could have shown that the amounts which were collected on this pretty worthless collateral after September 22, 1959 aggregated the grand and miserable total of but $3,663.02 (R. 14). The corporate defendant still ended up the loser to the extent of some $6,500.00 (R. 14).

Nevertheless, in his affidavit in opposition to the motion of the plaintiffs for body execution against him, Morris Gotthilf stood ready to cooperate with the court and offered to post bond in a reasonable amount to guarantee his presence and cooperation in any supplementary proceeding which the plaintiffs might wish to conduct (R. 15).

Mr. Justice Gellinoff was not satisfied (R. 44-45).

Morris Gotthilf filed an additional affidavit in which he stated:

> "2. I have no assets and the only income that I receive is from my business.
>
> "3. The net income (before taxes) which I received from my business for the past three years and in the current year to date is as follows:
>
> | | |
> |---|---|
> | 1962 to date | $ 3,177.54 |
> | 1961 Loss | (4,523.73) |
> | 1960 " | 11,543.30 |
> | 1959 " | 19,253.18 |
>
> • • •
>
> "5. Sometimes in the past I have had a successful refinancing which has brought me substantial income. I have some such transactions that I am working on now, but, like a lawyer with a case, I am not sure that they will be successful.
>
> "6. Concretely what I propose as a minimum is this: beginning March 1962 I will undertake to pay to the plaintiffs 25% of my net income, payable monthly on the 5th day of the following month, that is, the first payment to begin on April 5, 1962 and to continue monthly thereafter.
>
> "7. In conclusion I respectfully pray that the Court permit me to continue to try to earn all that I possibly can, for this will enable me to make payments

against the judgment. I have no other means whatever of obtaining funds. If I should be incarcerated I will have to stay there, for I will then be through professionally and in the finance field where I now make most of my present limited income.

"8. My heart prompts me to add two further thoughts, and they both stem from the fear that I have not appealed to Your Honor's discretion despite the fact that I have offered to do a little more than I think I can. The first thought is that if my offer of 25% of my net income is not high enough in the Court's opinion then I will try to comply with what the Court suggests it ought to be if the Court will make such a suggestion. The second thought is this: if the Court does grant the motion for the issuance of a body execution then my life is through, finished, professionally and in every other way; and in addition to this intolerable condition, I shall also have the problem of trying to persuade my attorney O. John Rogge to appeal to the Appellate Division, First Department from such an order, for as long as there is life in me I will continue to refuse to believe that in this wonderful country of ours a man can not only be deprived of his day in court but also have to go to jail, and that in a civil and not a criminal case. I know not how else to say it." (R. 21-22).

But Mr. Justice Gellinoff was not to be appeased (R. 45).

The petitioner argued before Mr. Justice Gellinoff that the court's application of §764 of the New York Civil Practice Act made this section violative of the due process clause of the Fourteenth Amendment to the United States Constitution. But Mr. Justice Gellinoff ruled otherwise, simply saying:

"Section 764 of the Civil Practice Act is constitutional." (R. 44)

Summary of Argument

With this Court's help under the due process clause of the Fourteenth Amendment, we shall soon come to look upon imprisonment for debt under such a provision as Section 764 of the New York Civil Practice Act as barbaric as we now regard lopping off a hand, or a hand and a foot, or flogging, as the penalty for certain offenses. Imprisonment for debt is already so out of accord with our regard for human dignity, that Section 764 violates the due process clause of the Fourteenth Amendment on a number of grounds:

a. Section 764 of the New York Civil Practice Act imposes a punishment on the petitioner without according him the incidents of a criminal trial, such as, for instance, an indictment or information specifying the charges against petitioner, proof of petitioner's guilt beyond a reasonable doubt, and a jury verdict by a unanimous jury.

b. Section 764 bears no reasonable relationship to the ends the legislature had in mind when the statute was enacted.

c. Section 764, taken together with Sections 515 and 517 of the New York Correction Law, denies petitioner the equal protection of the laws.

d. Section 764 inflicts upon petitioner a cruel and unusual punishment.

e. Section 764 imposes upon petitioner involuntary servitude other than as punishment for crime.

ARGUMENT

POINT I

Body Execution Generally

Perhaps the earliest of the English statutes treating imprisonment for debt is the *Statute of Marlborough*, enacted in 1267, which provided

> "[—] • • • That if Bailiffs, which ought to make account to their Lords, do withdraw themselves, and have no Lands nor Tenements whereby they may be distrained; then they shall be attached by their Bodies, so that the Sheriff, in whose Bailiwick they be found, shall cause them to come to make their account. • • • *Statute of Marlborough*, 1267, 52 Hen. 3, c. 23, §1 (repealed)."

While the differences are clear enough, doubtless medieval English legislation on the subject drew its inspiration from the ancient Roman practice of commiting debtors to slavery. See Holmes, *The Common Law* 14 (47th printing 1923); Hunter, *Roman Law* 968 (2d ed. 1885).

The reigns of Edward I (1277-1307) and Edward III (1327-1377) witnessed gradual expansions on the *Statute of Marlborough*. See, *e.g.*, *Statute of Westminster (II)*:

> "Concerning Servants, Bailiffs, Chamberlains, and all Manner of Receivers, which are bound to yield Accompt, it is agreed and ordained, That when the Masters of such Servants do assign Auditors to take their Accompt, and they be found in Arrearages upon the Accompt, all things allowed which ought to be allowed, their Bodies shall be arrested, and by the Testimony of the Auditors of the same Accompt, shall

be sent or delivered unto the next Gaol of the King's in those Parts; (2) and shall be received of the Sheriff or Gaoler, and imprisoned in Iron under safe Custody, and shall remain in the same Prison at their own Cost, until they have satisfied their Master fully of the Arrearages. (3) Nevertheless if any Person being so committed to Prison, do complain, that the Auditors of his Accompt have grieved him unjustly, charging him with Receipts that he hath not received, or not allowing him Expences, or reasonable Disbursements, and can find Friends that will undertake to bring him before the Barons of the Exchequer, he shall be delivered unto them; (4) and the Sheriff (in whose Prison he is kept) shall give Knowledge unto his Master, that he appear before the Barons of the Exchequer at a certain Day, with the Rolls and Tallies by which he made his Accompt; and in the Presence of the Barons, or the Auditors that they shall assign him, the Account [sic] shall be rehearsed, and Justice shall be done to the Parties, so that if he be found in Arrearages, he shall be committed to the Fleet, as above is said. * * * (7) And if he flee, and it be returned to the Sheriff that he cannot be found, exigents shall go against him from County to County, until he be outlawed, and such Prisoner shall not be replevisable. (8) And let the Sheriff or Keeper of such Gaol take Heed, if it be within a Franchise, or without, that he do not suffer him to go out of Prison by the common Writ called Replegiare, or by other Means, without Assent of his Master; (9) and if he do, and thereof be convict, he shall be answerable to his Master of the Damages done to him by such his Servant, according as it may be found by the Country, and shall have his Recovery by Writ of Debt. * * * *Statute of Westminster (II)*, 1285, 13 Edw. 1, Stat. 1, c. 11 (repealed)."

and the Statute of Acton Burnel, as it is called:

> "Forasmuch as Merchants, which heretofore have lent their Goods to divers Persons, be fallen in Poverty, because there is no speedy Remedy provided, whereby they may shortly recover their Debt at the Day of Payment * * * (12) * * * if it be found by the Roll or Writing, that the Debt was knowledged, and the Day of Payment expired, the Mayor or chief Warden shall cause the Body of the Debtor to be taken (if he be Lay) whensoever he happeneth to come in their Power, and shall commit him to the Prison of the Town, if there be any, and he shall remain there at his own Costs, until he hath agreed for the debt. * * * *Statute of Merchants*, 1285, 13 Edw. 1, Stat. 3, c. 1 (repealed)."

and the *Statute of Purveyors* as well:

> "Item, it is accorded, That such process shall be made in a writ of debt and detinue of chattels and taking of beasts, by writ of *Capias*, and by process of exigend by the sheriff's return, as is used in a writ of accompt. *Statute of Purveyors*, 1351, 25 Edw. 3, Stat. 5, c. 17 (repealed)."

The two centuries following on Edward III's statute must have been a time when all sorts of legislation suffered from local maladministration—everyone is familiar with the civil wars and dynastic changes which almost destroyed the young English nation in the Fifteenth Century—but in any event by 1565 imprisonment for debt had become so tainted that Elizabeth felt obliged to sponsor the enactment which follows:

> "Where divers persons of their malicious minds, and without any just cause, do many times cause and procure others of the Queen's majesty's loving sub-

jects, to be very much molested and troubled by attachments and arrests made of their bodies, as well by process of *latitat alias* and *pluries capias*, sued out of the court commonly called the King's bench * * * (2) and when the parties that be arrested or attached are brought forth to answer such actions and suits as should be objected against them, then many times there is no declaration or matter laid against the parties so arrested or attached, whereunto they may make any answer; (3) and so the party arrested is very maliciously put to great charges and expences, without any just or reasonable cause: and yet nevertheless, hitherto, by order of the law, the party so grieved and vexed could never have any costs or damages to him to be judged or awarded for the said unjust vexation and trouble: II. For remedy whereof * * * [the defendant is to have costs, damages, and charges where the plaintiff delays or discontinues the action]. * * * IV. And if any person or persons * * * shall by any way or mean, maliciously, or for vexation and trouble, cause or procure any other person or persons to be arrested * * * at the suit or in the name of any person or persons, where indeed there is no such person or persons known, or without the assent, consent or agreement of such person or persons * * * and shall thereof be convicted or lawfully accused by indictment, presentment, or by the testimony of two sufficient witnesses or more, or other due proof, shall for every such offense * * * have and suffer imprisonment of his or their body or bodies by the space of six months without bail or mainprise * * * [and shall have to pay to the unjustly arrested person three times his costs, charges, damages, and expenses and to the person in whose name the arrest or attachment issued, ten pounds]. 1565, 8 Eliz. 1, c. 2 (repealed)."

Nevertheless, the case of the *dishonest* debtor presented a separate issue in Elizabethan minds; a long procession

of special statutes began with the one enacted in the reign of Henry VIII, which recites that

> "divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors, their debts and duties * * * 1543, 34 & 35 Hen. 8, c. 4 (repealed)."

and empowers various officials to imprison the persons of such debtors and to distribute their assets among their creditors. See 8 Holdsworth, *History of English Law* 236 (1926 ed.). The 1543 statute was replaced by a more comprehensive one in 1571, see 13 Eliz. 1, c. 7, which was, in turn, amended and enlarged by statutes of 1604, see 1 Jac. 1, c. 15, and 1623, see 21 Jac. 1, c. 19. See also Holdsworth, *supra*, at 237. It is significant that none of these "dishonest debtor" statutes provided that the debtor would be relieved of his obligation upon being confined; later sources indicate that at common law execution upon the person discharged the debt. In *Strong* v. *Linn*, 5 N. J. L. 936 (Sup. Ct. 1820), the court said:

> "Now, if a *ca. sa.* [*capias ad satisfaciendum*, of which more later] be executed, that is sufficient in law for the whole debt * * * so that if you take the body at all you take it for the whole debt. * * * A *ca. sa.*, as respects the party against whom it is taken, is a full satisfaction by force, act and judgment of law, so that against him and his representatives there can be no other, for when the plaintiff hath begun and chosen the body he can resort to no other execution against the self-same party. * * * It is true that the common law has been altered by statute in this respect, in cases where the defendant escapes or dies in prison;

> there, by the force of the statute, there may be a resort to the goods, but in all other cases * * * it still remains in its full force. *Id.* at 941."

See also Holmes, *supra*, at 14: "The principle of our own law, that taking a man's body on execution satisfies the debt, although he is not detained an hour * * *." Therefore it appears that even from the earliest times the Anglo-American community distinguished between instances of genuine destitution on the one hand and wilful withholding of funds on the other. The statute of 1571, 13 Eliz. 1, c. 7, *supra*, provided that creditors should continue, after execution upon the debtor's person, in all their remedies in respect of any unpaid portion of the debt. See 8 Holdsworth, *supra*, at 240.

From here it is but a small step to the proposition that the common law of body execution, through its writ of *capias ad satisfaciendum*, did not seek to punish the honest but impoverished debtor. In *Lewis* v. *Morland* (1818), 2 B. & Ald. 56, 106 Eng. Rep. 288, Holroyd, J. had it that the matter in issue was "clearly in the nature of mesne process, and is not analogous to a ca. sa. where a party is brought into Court to satisfy his debtor [creditor?] * * *." *Id.* at 65, 106 Eng. Rep. at 291. Blackstone was of the same opinion:

> "The intent of it [the writ] is to imprison the body of the debtor, till satisfaction be made for the debt, costs, and damages: it therefore doth not lie against any privileged persons, peers or members of parliament, nor against executors or administrators, nor against such other persons as could not be originally held to bail. 3 Blackstone, *Commentaries on the Laws of England* 414 (6th ed. 1775)."

See also *In re Haight*, 11 Civ. Pro. 227 (N. Y., County Ct. 1886): "The English process which we call an execution against the person or body execution, is intended to confine the debtor until he satisfies the debt." *Id.* at 229; and see "Execution," 16 *Halsbury's Laws of England* 62-63 (3d ed. 1956): "The mandate of the writ of *capias ad satisfaciendum* (usually known as a *ca. sa.*) is to take the execution debtor, if he should be found in the bailiwick, and him safely keep so that the sheriff may have his body * * * to satisfy the execution creditor * * *." as well as Holmes, *supra*, at 14: "The principle of our own law, that taking a man's body on execution satisfies the debt * * *."

Whatever the theory in these early days of the development of the law of body execution, the abuses inflicted by creditors did not abate and the sheriffs' connivings were added to the debtor's woes. The courts showed little sympathy, if Justice Hyde's dictum in *Manby* v. *Scott* accurately portrays the judiciary's sentiments:

> "If a man be taken in execution, and lie in prison for debt, neither the plaintiff, at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink or clothes; but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God, says the law * * * [and] so say I * * *. 1 Mod. 124, 132, 86 Eng. Rep. 781, 786 (K. B. 1663)."

Some relief, however, came with *An act for the relief and release of poor distressed prisoners for debt*, passed in 1670:

> "Forasmuch as very many persons now detained in prison, are miserably impoverished, either by reason of the late unhappy times, the sad and dreadful fire, their own misfortunes, or otherwise, so as they are

totally disabled to give any satisfaction to their creditors, and so become, without advantage to any, a charge and burden to the kingdom, and by noisomness (inseparably incident to extream poverty) may become the occasion of pestilence and contagious diseases, to the great prejudice of the kingdom; (2) be it therefore enacted * * * That it shall and may be lawful to and for any justice of the peace * * * by warrant under his hand and seal, to require the sheriff, gaoler, or keeper of any prison * * * to bring without delay, the body of any person being in prison for debt * * * or damages (and petitioning such justice to be discharged) to some convenient place within the distance of one mile from the said prison; (3) and shall certify the cause and causes of the imprisonment, before the same justice * * *. II. And in case such prisoner coming before such justice shall take an oath to this effect, viz.

"I A. B. do upon my corporal oath solemnly profess and declare before Almighty God, That I have not any estate real or personal, in possession, reversion or remainder, of the value of ten pounds in the whole, or sufficient to pay the debt or damages for which I am imprisoned; (2) and that I have not directly or indirectly sold, leased, or otherwise conveyed, disposed of, or entrusted all or any part of my estate, thereby to secure the same, to receive or expect any profit or advantage thereof, or defraud or deceive any creditor or creditors whatsoever to whom I stand indebted. III. * * * (2) [W]hen if it shall appear * * * that the said oath taken by the said prisoner, be not disproved by good testimony of any credible person or persons upon oath * * * then the said justices being satisfied therewith, shall direct their warrant * * * commanding the said sheriff, gaoler, or keeper of the prison, to set at liberty, and discharge the said prisoner, if imprisoned for the causes aforesaid, and no other * * *. XI. And likewise that the said lord chief justices, lord chief

baron, and justices of the peace in their several jurisdictions, and all commissions for charitable uses, do their best endeavours and diligence to examine and find out the several legacies, gifts and bequests bestowed and given for the benefit and advantage of the poor prisoners for debt * * * and the same so found out and ascertained, to order and settle in some manner and way, that the prisoners hereafter may not be defrauded, but receive the full benefit thereof, according to the true intent of the donors. * * * XIII. And whereas it is become the common practice of gaolers and keepers * * * to lodge together in one room or chamber and bed, prisoners for debt and felons, whereby many times honest gentlemen, tradesmen and others, prisoners for debt, are disturbed and hindred in the night-time from their natural rest, by reason of their fetters and irons, and otherwise much offended and troubled by their lewd and prophane language and discourses, with most horrid cursing and swearing much accustomed to such persons; (2) be it enacted by the authority aforesaid, That it shall not be lawful hereafter for any sheriff, gaoler or keeper of any gaol or prison, to put, keep or lodge prisoners for debt and felons together in one room or chamber; but that they shall be put, kept and lodged separate and apart one from another in distinct rooms * * *. 1670, 22 & 23 Car. 2, c. 20. See also 8 Holdsworth, *supra*, at 234-35."

In 1678 the statute was amended as follows:

"Whereas by * * * An Act for Relief and Release of Poor Distressed Prisoners for Debt * * * Provision hath been made for Relief and Release of such Prisoners as were in Prison for Debt or Damages * * * Notwithstanding which, the persons of such Prisoners have not been discharged of their Imprisonments * * * Be it now enacted * * * That such weekly allowance [not exceeding eighteen pence per week] shall be paid to

the Prisoner himself, and not to the Goal [sic] -Keeper * * * and if within the space of Three months after such weekly Allowance by any Creditor, no Estate of the Prisoner shall be discovered or made out * * * then the said Prisoner shall forthwith be Discharged by Warrant * * * as fully and amply as if such Prisoner had been Discharged by the Justices of the Peace at their Quarter Sessions, as in the said recited Act is mentioned * * *. Provided also, That no person shall be Discharged by this Act, that hath not, or shall not before such Oath made, have remained in Prison by the space of Six moneths. Provided also, That no person by virtue of this Act shall be Discharged out of Prison, who shall stand Charged in Execution with more then [sic] the Sum of Five hundred pounds to any one person, Principal Money, and Damages. * * * Provided always, That no Merchant Stranger, or other Alien or Foreigner that hath been Arrested, and is in Prison on any Action or Suit, for or by reason of any Debt, or other Engagement Contracted or Entered into beyond the Seas, shall have any benefit by this Act * * *. *An Act for the further Relief and Discharge of Poor Distressed Prisoners for Debt*, 1678, 30 Car. 2, See also 8 Holdsworth, *supra*, at 235."

Further:

"In 1690 an attempt was made to prevent debtors from using the Acts to defraud their creditors, by causing themselves to be imprisoned in collusive actions [2 W. & M., Sess. 2, c. 15]; and further amendments of the law were made in 1694 [5 & 6 W. & M., c. 8] and 1695-1696 [7 & 8 Will., c. 12]. It was provided by the latter of these two Acts that the Acts should not apply to debtors taken in execution for the non-payment of fines imposed for offenses [§8], to debtors to the king [§9], or to those owing damages for wrongs which were felonious [§15]. *Ibid.*"

But matters cannot have improved to any appreciable extent for, as Holdsworth put it:

> "The number of these Acts leads us to think that they were not very effectual, either to procure the release of prisoners, or to put a stop to the malpractices of gaolers or their officers. The justices of the peace were not well fitted to do the duties imposed on them. Gaolers and officials were more likely to side with rich creditors than poor debtors; and the same might be said of many of the justices. *Id* at 236."

In London, in 1768, there appeared a little volume entitled *Insolvency, with Observations Concerning the Same, By a Gentleman of the Middle Temple.* The identity of its author remains unknown but his "Observations" merit attention:

> "I have ever looked upon the present mode of proceeding against debtors not only oppressive towards them, but injurious to the creditors, and more particularly so, where the debtors are taken to gaol or stand committed to either of his majesty's prisons of the King's Bench or Fleet. • • • When a debtor is arrested, as before mentioned, for want of bail, he is taken on or before the return of the writ or process, to the county gaol, or removed by habeas corpus at the expence of four pounds and upwards, in proportion to the distance of the place from whence he is conveyed and brought before a judge of the court, out of which the habeas corpus issued and by him committed, for want of bail, to the prison of such court. Now if the plaintiff has an inclination to be vexatious (as is too often the case), he may remove the defendant to the prison of the court out of which his writ or process issued, in order to proceed against him there • • • or • • • to the prison of the different court (though such

step is quite unnecessary in respect to the proceedings), and then the defendant having provided himself with bedding, room, &c. in the prison to which he was first committed, is obliged, for convenience sake, to be at the expence of being removed back again. This is a grievance and an heavy one, as it too frequently happens, such a prisoner by this means destroys all he can get from others, as well as what he can scrape together of his own, before he can get himself properly immured. After all this apparatus, the plaintiff need not declare against the prisoner until the last day of the second term, after the return of his writ, including the term in which his writ was returnable, which (if he chooses to keep him in duress) he will take care to do. Then he has three terms more to proceed against him, to tryal or judgment, including the term in which the declaration was delivered, which, when done, he has two more terms, including the last of the three, to charge him in execution; by the time all this is performed, the prisoner has been upwards of an year and an half in confinement: now, if the cause of action does not exceed the sum of one hundred pounds, the prisoner, when in execution, may present his petition for relief under that wholesome act, called the Lord's act [1759, 32 Geo. 2, c. 28]; a rule is thereupon granted, pursuant to such petition, for the prisoner to be brought before the court on such a day as is therein mentioned; a copy of such rule being first served upon the plaintiff or his attorney, the prisoner is brought up accordingly, and delivers in his schedule of his estate and effects (if he has any), and conforms in all respects to the direction of the said act: [See also 3 Blackstone, *supra*, at 416.] but the plaintiff's attorney generally appears, and telling the court he is dissatisfied in respect to the verity of the schedule (which is more a matter of cruel form than reality), the prisoner is ordered, on such dissatisfaction, back to prison, and

to be brought up again the second day of the next term. Frequently a long vacation intervenes, which delights an oppressive plaintiff, or if the second bringing up happens in a Trinity term, then the plaintiff will pay his debtor one or two allowances, as directed by the said act, and then drop him; notwithstanding which, the defendant must remain in prison until the next ensuing term, as he cannot be discharged but by moving the court for that purpose, though I cannot see why the practice might not allow of its being done before a judge at his chambers. Thus revenge enjoys near two years gratification within the rules of practice; but what is a prisoner to expect who stands charged with above the sum of one hundred pounds? he must endeavour to make his distresses familiar to him, till the cries of mercy move a legislature to restore him to liberty, and his starving family. If prisoners, under this circumstance, were to have *in misericordia quorentis* inscribed upon their backs, how would humanity shudder at seeing thousands perishing under that badge? thus I have endeavoured, briefly, to set forth the form of proceedings against imprisoned debtors; and I am apt to believe every impartial breast, upon maturely considering this mode of process, must think it extremely oppressive, *ab initio ad infinitum*. * * * I should be glad to be informed of any one penal law now existing, which meerly inflicts imprisonment, that falls so heavy upon the criminal, as the laws against prisoners for debt. * * * [T]hese seeming defects and hardships give rise to the multiplicity of petitions from all the gaols and prisons in England, imploring that relief of the legislature, which the creditor refuses to grant. *Id.* at 1, 5-9, 10, 14."

But in England "that relief of the legislature, which the creditor refuses to grant" was still a century away. It was not until 1869 that Parliament finally abolished im-

prisonment for debt, and then only with important exceptions. The famous Debtors Act, which won approval in that year, declared that:

> "With the exceptions herein-after mentioned, no person * * * shall be arrested or imprisoned for making default in payment of a sum of money."
>
> "There shall be excepted from the operation of the above enactment:
>
> "1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:
>
> "2. Default in payment of any sum recoverable summarily before a justice or justices of the peace:
>
> "3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control:
>
> "4. Default by any attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order:
>
> "5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order:
>
> "6. Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made:
>
> "Provided, first, that no person shall be imprisoned in any case excepted from the operation of this sec-

tion for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money. *The Debtors Act*, 1869, 32 & 33 Vict., c. 62, §4."

Section 5 is equally pertinent:

> "*Saving of power of committal for small debts.*—Subject to the provisions herein-after mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court. Provided—* * *
>
> "(2) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.* * *
>
> "No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place. * * * *Id.*, §5."

By the terms of Section 5, then, a "dishonest" debtor not subject to the exceptions enumerated in Section 4 might nevertheless be imprisoned, but for no longer than six weeks and only upon the court's finding that the means were available but the will lacking. The old distinction was, in part, preserved.

Soon the courts were faced with the question of whether the general policy of the Act envisioned punishment. In the case of *Marris* v. *Ingram*, 13 Ch. D. 338 (1879), Lord Jessel said that

> "• • • [T]he Act abolishes imprisonment for debt in the case of an honest debtor, but it is at the same time intended for the punishment of a fraudulent or dishonest debtor. It is in that sense vindictive, and intended to be so. *Id.* at 343. See also *Buckley* v. *Crawford*, [1893] 1 Q. B. 105, 108; *In re Gent*, 40 Ch. D. 190, 194-95 (1888)."

while in *Barrett* v. *Hammond*, 10 Ch. D. 285 (1879), the court construed the Act as follows: "The law [that is, the Debtors Act] does not act vindictively; the Court has no power to inflict any punishment upon the man • • •." *Id.* at 288-89. Without even attempting to answer the question, the writer would call attention to the last-cited paragraph of Section 5. Should it be read as reversing the common-law notion of satisfaction for the debt or rather as no more than an accommodation to the reality that six weeks in prison was, relatively, so short a period of confinement that few creditors could hope to have complete satisfaction by insisting on it?

• • •

Moving on to the American experience, it should be noted at the very outset that the independence of the United States was not the occasion for a general abolition of body execution, either at the instance of the states or of the federal government.

> "The most important of the planks were the demands for education and for the abolition of imprison-

ment for debt. Education would diffuse knowledge, and knowledge, the early labor leaders believed, was power. • • •

"But the main specific grievance came to be the question of imprisonment for debt. In 1830 five sixths of the persons in the jails of New England and the Middle states were debtors, most of them owing less than twenty dollars. The law was thus, in effect, a class law, for, by withdrawing debtors from the economic world, it prevented their saving up and paying off. It was, moreover, insulting, for in last analysis it assumed that debtors would never meet their obligations unless prompted by terror of punishment. General fears about loss of status thus began to focus on imprisonment for debt as a peculiarly cruel and wanton agency of degradation.

"• • • In December, 1822, [Colonel Richard M.] Johnson proposed a bill in the United States Senate abolishing imprisonment as a punishment for complaints of debt in federal courts. Van Buren and others supported him, but for some years it failed of passage. Punctually Johnson would reintroduce it each session, delivering a new speech crammed with fresh and horrifying examples and ending with a stirring appeal to democratic principles. His object was less to achieve a concrete reform, for the number of people imprisoned on federal writs was negligible, than to give the whole movement national significance. His orations, widely reprinted and circulated, spread the agitation throughout the land.

"The chief opposition came from the business community with its vague but deep conviction that imprisonment for debt was bound up with sanctity of contracts. 'I shall surely get no thanks from any one,' wrote John Quincy Adams testily in 1831, con-

templating a letter on this question, 'for pointing to the consequences * * * upon the security of property and upon fidelity to contracts, as well as upon credit.' Van Buren reported meeting the greatest hostility among merchants and lawyers. * * *

"When Jackson became President, he added his prestige to Johnson's perseverance ('it should be the care of a republic not to exert a grindstone power over misfortune and poverty'), and finally, in 1832, the bill passed both Houses and became a law.[1] Schlesinger, *The Age of Jackson* 134-36 (1950)."

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1. The present federal statute on the subject is 28 U. S. C. §2007 (1958): "*Imprisonment for debt.* (a) A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State. (b) Any person arrested or imprisoned in any state [sic] on a writ of execution or other process issued from any court of the United States in a civil action shall have the same jail privileges and be governed by the same regulations as persons confined in like cases on process issued from the courts of such State. The same requirements governing discharge as are applicable in such State shall apply. Any proceedings for discharge shall be conducted before a United States commissioner for the judicial district wherein the defendant is held." See also Fed. R. Civ. P. 64: "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action." And see the Virgin Islands Bill of Rights, 48 U. S. C. §1561 (1958): "* * * No person shall be imprisoned or shall suffer forced labor for debt."

And even today the State of New York does not stand alone in its adherence, in one form or another, to a policy authorizing imprisonment for debt. In 1921 it was written that

> "* * * almost two centuries after English debtors, seeking relief from the harsh laws of England, founded an American colony, the institution of the debtor's prison still prevails in Illinois and in other states of the Union, though many have abolished it altogether. Parnass, *Imprisonment for Civil Obligations in Illinois*, 15 Ill. L. Rev. 559, 571 (1921). See also Note, 26 Colum. L. Rev 1007, 1009 (1926)."

But the outcry has been a long and bitter one, witness Colonel Johnson's campaign, *supra*, and a book written by one Thomas Herttell in 1823:

> "By the law of imprisonment for debt * * * a creditor could put his debtor in prison and keep him there, until he starved to death or paid the debt, and that without any regard to the merits or demerits of his prisoner. This is the law of imprisonment for debt, exhibited in its native deformity; and by it the first law of nature, that of self-preservation, is violated; because the debtor, being deprived of his personal liberty, is restrained in the means of maintaining himself: he is also compelled to the violation of those natural obligations which bind him to maintain his family, and all would starve to death were there no means for their relief other than the tender mercy of the law in question. * * * [I]t is no sufficient answer to this charge, nor even a compliment to that law, to allege, that the benevolence of friends, or the public alms and and soup-houses, have, and always will, prevent that, which otherwise would be its deplorable consequences; for that law must be radically bad, as well

> as evil in its effects, which requires the continual exercise of the benevolence of friends, the philanthropy of strangers, and the interposition of public charity, to avert its unrighteous operation. * * * Should a person go into court with such a contract in his hand, and insist upon its execution, would not a humane, moral, and religious audience, indignantly exclaim, "Worse than Shylock! He would have been satisfied with a pound of human flesh, but this man would have the whole carcass at his own disposal." What an iniquitous contract that must be, the consequences of which are so abhorrent to the human feelings! yet as bad as it may be, and unquestionably is, it contains nothing more than what is authorized and justified by the law of imprisonment for debt, in concert with the spirit of which, however astonishing it may appear, it is absurdly assumed as an *axiom* in forensic logic, that "*the imprisonment of the body is the greatest satisfaction* known to the law:" a position which not only violates truth and common sense, but goes the length of arraying acts of barbarity in the robes of justice. By its fruit the tree is known; and those are surely unrighteous laws which authorize a course of conduct, from which the benevolent feelings of the human heart revolt. Herttell, *Remarks on the Law of Imprisonment for Debt; Showing Its Unconstitutionality, and Its Demoralizing Influence on the Community* 13-14, 15, 17-18 (1823)." (All italicized in original.)

Eighty years later Mr. Chief Justice Hughes added his views as follows:

> "The reform should be completed, and, save in cases of contempt of court, and where it may be necessary to arrest the defendant in order to insure the performance of an act, the failure to perform which would be punishable as a contempt * * * arrest and

> imprisonment in civil cases should be abolished. * * * The statutes * * * are a constant menace to the innocent; they are the occasion for wrongs even more serious, because committed under the guise of legal process, than those which they were designed to prevent and to punish. Provisions of such slight utility at the best and so commonly perverted should be repealed without delay. Hughes, *Arrest and Imprisonment on Civil Process*, 28 Rep. N. Y. State Bar Ass'n 151, 170, 179-80 (1905).
>
> See also Medina, *Shall New York Surrender Leadership in Procedural Reform?*, 29 Colum. L. Rev. 158, 168 (1929) ('It was never intended that there should be one rule for the rich and another for the poor.')."

Now, in 1963, the Court has the opportunity to consider the constitutional implications of body execution as that institution has survived under the laws of the state of New York.

POINT II

By our current standards of decency and fairness, body execution to enforce a civil debt has become so barbarous and obsolete that it violates the due process clause of the Fourteenth Amendment.

Late in the last century, this Court began what has become an extended and expansive application of the due process clause of the Fourteenth Amendment. This development was a natural one, for it was in accord with the historical origin and role of due process clauses. Today in this country whenever a lawyer has a case in the state courts in which he feels that his client has not been given the consideration which our current standards of fairness and decency and our regard for the individual

human being require, he turns to the due process clause of the Fourteenth Amendment. The writer traced this development in his recent volume *The First and the Fifth* 59-75 (1960).

In the first term after the appearance of the writer's volume, this Court set aside state court decisions in nearly a dozen cases because of violations of the due process clause of the Fourteenth Amendment. In *Culombe* v. *Connecticut*, 367 U. S. 568 (1961), *Peck* v. *Pate*, 367 U. S. 433 (1961), and *Rogers* v. *Richmond*, 365 U. S. 534 (1961), this Court set aside state court convictions because they involved forced confessions.

In *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), *Reynolds* v. *Cochran*, 365 U. S. 525 (1961), and *McNeal* v. *Culver*, 365 U. S. 109 (1961), this Court set aside state court convictions because the defendants were deprived of the effective assistance of counsel.

In addition to these decisions, the like of which occur at almost every term, this Court held in *Smith* v. *Bennett*, 365 U. S. 708 (1961), that a state cannot make the writ of habeas corpus available only to prisoners who can pay the necessary filing fees; in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), that Leslie Irvin had not had a fair trial because pre-trial publicity, which labelled him as the "mad dog killer", had prejudiced the jury against him; in *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), that Maryland's requirement that a state officeholder declare his belief in God was invalid; in *Marcus* v. *Search Warrants*, 367 U. S. 717 (1961), that a general state warrant for the seizure of allegedly obscene material was illegal; and in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), overruling its earlier decision to the contrary in *Wolf* v. *Colorado*, 338 U. S. 25 (1949), that material illegally

seized by state officers was inadmissible even in a state court proceeding.

In *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), this Court held that Georgia practice which allowed a criminal defendant to make an unsworn statement but denied him the aid of his counsel's questioning while making it, unconstitutionally deprived him of the effective assistance of counsel. This case arose out of the fact that Georgia retained the old common-law rule that a defendant in a criminal case could not be sworn on his own behalf. Georgia was the only state to keep this old rule. Justices Frankfurter and Clark would have gone further than the rest of the Court: they would have held that this old rule, which Mr. Justice Clark characterized "as an unsatisfactory remnant of an age gone by", violated the Fourteenth Amendment's due process clause.

If the old common-law rule, centuries old, that a defendant in a criminal case could not be sworn on his own behalf, is now the basis for a violation of the Fourteenth Amendment's due process clause, then it is submitted that §764 of the New York Civil Practice Act, providing for body execution, as applied in the instant case simply to enforce the collection of a debt, likewise now violates this clause.

POINT III

Petitioner was denied due process of law because Section 764 of the New York Civil Practice Act imposed a punishment on petitioner without according him the incidents of a criminal trial, in violation of the Fourteenth Amendment to the Constitution of the United States.

A. Section 764 imposed a punishment on petitioner.

The history of Section 764 of the New York Civil Practice Act points clearly to the fact that when it was enacted in its present form, by the Laws of 1940, ch. 552, §1, the legislature intended to impose a punishment upon such judgment debtors as petitioner.

The inquiry must begin with the Stillwell Act, Laws of 1831, ch. 300, which bore the title *An Act to abolish Imprisonment for Debt, and to punish Fraudulent Debtors.* While it is true that the Act "made no distinction between classes of debtors, but all were equally entitled to a discharge if * * * [the] proceedings were just and fair," *In re Haight*, 11 Civ. Pro. 227, 229-31 (N. Y., County Ct. 1886), the judgment debtor seeking discharge from imprisonment was required to take an oath "that he had not at any time * * * disposed of * * * his estate * * * with the view * * * or intent to injure or defraud any of his creditors." *Ibid.* If the prisoner refused so to swear, or swore falsely, obviously the court would order him to return to jail, *ibid.*, and hence it follows that the proceedings for discharge were designed to discover "fraudulent debtors" and to insure their continued incarceration, as well as to set in motion the release of impoverished victims of body execution.

Moreover, in 1869 New York's highest court had occasion to discuss the Stillwell Act; its conclusion on the question of punishment fully supports petitioner's construction:

> "It would not be profitable to dwell upon the reasons moving the legislature to punish fraud, and to treat the fraudulent debtor as a criminal, or to inquire whether it is reasonable to punish a fraudulent debtor with more severity than any other willful wrong-doer * * *. The statute does not purport to imprison for debt, but to punish for an offense. * * * [T]he legislature intended to punish the fraudulent debtor * * *." *People ex rel. Latorre* v. *O'Brien*, 6 Abb. Pr. (n.s.) 63, 67, 68, 69 (N. Y. Ct. App. 1869).

Furthermore, the opinion in *In re Haight, supra*, closed its description of the discharge proceedings under the Stillwell Act with the following observation:

> "This Act was * * * modified in 1833 * * * and afterwards, with further modifications, became a part of the Revised Statutes * * * but none of these modifications affect in anywise the general scope and theory of the Act. The proceedings upon the part of the debtor have always * * * required * * * that he swear, in substance, that he has not disposed of any part of his property with intent to injure or defraud any creditor." *Id.* at 231.

Now although the Stillwell Act was repealed by the Laws of 1880, ch. 245, §1(9), the use of the present tense of the verb "affect" six years thereafter constituted nothing short of a declaration on the part of the New York court that the Act's policy remained in full force after the enactment of the Code of Civil Procedure in 1880.

It should also be noted that in 1905 Mr. Chief Justice Hughes was able to characterize the New York statute as

"unsound in principle. The statute is essentially a *punitive* measure. * * * [A]s a *punitive* statute, it is least defensible. Punishment should be for wrongs done to the community." Hughes, *Arrest and Imprisonment on Civil Process*, 28 Rep. N. Y. State Bar Ass'n 151, 170-71 (1905). (All italicized in original.)

Hence when Mr. Justice Gellinoff wrote that the "defendant has neglected to bare completely his present financial status and future prospects, and to present any plan for payment of the judgment" (R. 45), it is clear that he did not abuse his discretion under New York law, but rather regarded his discretion as determined by the history of Section 764.

Turning now to the constitutional meaning of "punishment," two recent decisions of this Court make it plain that the statute in question imposed a punishment on petitioner within the meaning of the highest law of the land.

In *Trop* v. *Dulles*, 356 U. S. 86 (1958), the petitioner, a native-born American, lost his citizenship by reason of his conviction by court martial of wartime desertion. His application for a passport was denied on the ground that under Section 401 (g) of the Nationality Act of 1940, as amended, 8 U. S. C. §1481 (a)(8)(g), he had lost his citizenship because of the conviction and the ensuing dishonorable discharge. In 1955 the petitioner therefore initiated an action for a judgment declaring him a citizen. The District Court having granted the Government's motion for summary judgment, and the Court of Appeals for the Second Circuit having affirmed, this Court granted certiorari. *Id.* at 88. Mr. Chief Justice Warren held, for the Court, that the loss of citizenship constituted a cruel and unusual punishment within the meaning of the Eighth Amendment, but

what was said on the question of punishment generally has great bearing on petitioner's present Point:

> "But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable. * * * Doubtless even a clear legislative classification of a statute as "non-penal" would not alter the fundamental nature of a plainly penal statute. * * * The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature." *Id.* at 94, 95, 96.

Moreover, the Court's opinion, by Mr. Justice Goldberg, in the very recent case of *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), sets out several criteria for determining which sanctions constitute punishments and which do not:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. * * * Here * * * the statute's *primary* function is to serve as an additional penalty for a special category of draft evader." *Id.* at 168-70 (Emphasis added.)

It is as though Mr. Justice Goldberg had in mind Section 764, not the statutes involved in the *Mendoza-Martinez* case. Is there an "affirmative disability or restraint" greater than imprisonment? Is not *scienter* the basis of fraud? Does not imprisonment "promote the traditional aims of punishment"? And does it not appear "excessive in relation to the alternative purpose [presumably, coercion of payment] assigned"?

Petitioner submits that the *Trop* and *Mendoza-Martinez* cases put it beyond dispute that Section 764 imposed a punishment on petitioner within the meaning which the Court has become accustomed to assign to the word. *Cf. Flemming* v. *Nestor*, 363 U. S. 603, 614 (1960); *United States* v. *Constantine*, 296 U. S. 287, 294 (1935).

B. *The imposition of a punishment without the incidents of a criminal trial violates the due process clause of the Fourteenth Amendment.*

In support of the proposition that no one can be punished without the benefits of a criminal trial petitioner relies, again, on the authority of this Court, but before proceeding to the cases, it might prove profitable to turn to some of the non-judicial authorities cited in the historical summary which precedes the Argument.

In 1823 Thomas Herttell wrote that:

> "* * * the law of imprisonment for debt, which authorizes any creditor to deprive an honest, guiltless debtor, of his right of personal liberty, and to take him and imprison him, for *any sum of debt;* and, which also authorizes any creditor to deprive a *fraudulent* debtor of his right of personal liberty, contrary to the law of the land, which declares, that 'no person shall be taken and imprisoned for *any* offence, unless it be

by indictment, presentment, &c. in due form, and by due process of law,' in criminal cases, is as plain and obvious an infraction of the constitution and bill of rights of the people of this state, as imagination can suggest. Herttell, *Remarks on the Law of Imprisonment for Debt; Showing Its Unconstitutionality, and Its Demoralizing Influence on the Community* 34-35 (1823)" (All italicized in original.)

and Mr. Chief Justice Hughes was of the identical opinion:

"Under the existing law in civil cases, the defendant is arrested upon an order based upon affidavits; he is not taken before a magistrate that his case may be examined; he has no right to be confronted with witnesses or to cross-examine them. * * * He is as truly imprisoned as if arrested on criminal process, but is denied the privileges of one accused of crime. * * * If one has been guilty of wrong deserving of punishment by imprisonment, he should be punished in an orderly way, by criminal procedure, which, while sufficiently stringent to protect every proper interest, is just, and even merciful, as compared with the law of civil arrest. If there is any case of wrong within the law of civil arrest, which should be punished by imprisonment, and which is not already covered by the criminal statutes, let the latter be amended to cover it. Hughes, *supra*, at 172-73."

Further:

"* * * [E]xecution against the body * * * presents the anomaly of imposing a criminal consequence upon a civil judgment, a judgment based on a verdict and on a trial of the issues wherein the charges need be proved merely by a preponderance of the evidence, and not, as in other cases where criminal consequences follow, beyond all reasonable doubt. Parnass, *Imprisonment for Civil Obligations in Illinois*, 15 Ill. L. Rev. 559, 571-72 (1921)."

Turning, then, to the cases in this Court, *Wong Wing* v. *United States*, 163 U. S. 228 (1896), held that a punishment may not be imposed absent the incidents of a criminal prosecution; the United States Commissioner's sentence of one year at hard labor was overthrown as repugnant to the Fifth and Sixth Amendments to the Constitution. But in *Wong Wing* Congress had expressly declared the forbidden conduct criminal, that is to say, only the method of determining guilt was at issue. Petitioner maintains, therefore, that while the decision in *Wong Wing* may have carried with it the implication that no punishment may be imposed without the incidents of a criminal trial regardless of whether the legislature has declared the defendant's activity criminal, the case is not controlling authority for the proposition that any punishment imposed pursuant to some proceeding other than a full criminal trial is void as violative of due process.

Rather, Petitioner relies again on the Court's opinion in *Kennedy* v. *Mendoza-Martinez, supra;* here the Court filled the gap left open by *Wong Wing*:

> "Conviction for draft evasion * * * is not prerequisite to the operation of this sanction. Independently of prosecution, forfeiture of citizenship attaches when the statutory set of facts develops. * * * This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further. * * * We conclude, for the reasons stated, that §§401(j) [of the National-

> ity Act of 1940, as amended] and 349(a)(10) [of the Immigration and Nationality Act of 1952] are punitive and as such cannot constitutionally stand, lacking as they do the procedural safeguards which the Constitution commands. * * * Dating back to Magna Carta * * * it has been an abiding principle governing the lives of civilized men that 'no freeman shall be taken or imprisoned * * * without the judgment of his peers or by the law of the land.' What we hold is only that, in keeping with this cherished tradition, punishment cannot be imposed 'without due process of law.' Any lesser holding would ignore the constitutional mandate upon which our essential liberties depend. *Id.* at 166-67, 186."

But under §764 of the Civil Practice Act a vindictive creditor or his attorney can inflict on a judgment creditor the criminal sanction of imprisonment without any of the safeguards of a criminal trial. There is no indictment or information. On the contrary, the application may be made in an *ex parte* manner. It may be made upon nothing more than a mere affidavit, and it need not even be made by the creditor—his lawyer can do it. If the order for body execution is signed, the sheriff can literally pick the judgment debtor off the street and take him directly to jail. Moreover, after the statutory time has elapsed and the judgment debtor is released, he can be re-incarcerated on another judgment arising out of, for example, the same transaction or business failure, thus in theory keeping him in civil jail for the rest of his life—if there are enough judgments.

All this may happen to one who merely lost a civil action wherein the plaintiff proved his case by a mere preponderance of the evidence, and then, in a jury case, by

convincing only ten jurors out of twelve. Further, the judgment could have arisen out of a trial before only a judge without a jury, or before a referee, or even as a result of a summary judgment or other motion.

Moreover, the judgment creditor can be a corporation, or even an assignee of the original claim. If the body execution arose out of a negligence action, the negligent act could have been committed by the jailed judgment debtor's agent or servant. (*Ossmann* v. *Crowley*, 101 App. Div. 597, 92 N. Y. Supp. 29 (1st Dept. 1905).)

Finally, as in the instant case, the judgment creditor can have acquired his status simply by virtue of a default judgment. Incarceration for such a reason is shocking, yet it has happened!

If a law allowed one to be convicted (and thereafter jailed) for *criminal* fraud on a "preponderance" of the evidence by convincing ten out of twelve jurors, or one judge or as a result of losing a motion, and allowed incarceration to be initiated by the People on an *ex parte* application by affidavit, it would clearly be a denial of due process. Yet that is exactly what section 764 allows.

Moreover in a criminal action a not guilty verdict ends forever the threat of jail for the defendant on the offense charged; but in a civil action new trials can be granted for many different reasons over and over again after a defendant has won. Each time, the prospective judgment debtor is subjected to jail if ultimately he loses and can not pay. If section 764 does not violate due process, then neither does trial by ordeal, oath or combat, with which the statute may legitimately be compared, and with which it properly belongs.

Petitioner contends, therefore, that the New York legislature's failure to declare his conduct criminal is irrelevant to the issue at hand, and that the punitive nature of the sanction having already been established above, the operation of Section 764 of the New York Civil Practice Act upon Petitioner deprived him of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

POINT IV

Petitioner was denied due process of law because Section 764 of the New York Civil Practice Act is, by its own terms, entirely incompatible with its clearly expressed purpose, and was therefore enacted in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioner submits that Section 764, when construed together with other applicable provisions, must fall as repugnant to the firmly-established constitutional principle that a state statute must bear some reasonable relationship to the ends the legislature had in mind when the statute was enacted. For the purposes of this Point it is unnecessary to assume that Section 764 imposes a punishment in the constitutional sense of the word, for the principle behind this Point rests in considerations of "substantive due process," as it has been called, and not in those of "procedural due process." See Rogge, *The First and the Fifth* 62-63 (1960).

In *Nebbia* v. *New York*, 291 U. S. 502 (1934), this Court, through Mr. Justice Roberts, laid down this test of substantive due process:

> "* * * [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * * If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. *Id.* at 525, 537."

It is Petitioner's position that "the means selected" by Section 764, when that statute is construed in the light of other pertinent provisions, bear no "real and substantial relation to the object sought to be attained," as that object can be gleaned from the clearly expressed purpose of the statute.

It is obvious from the discussion in Point III that the purpose which motivated the legislature in its enactment of Section 764 was a desire to curtail the activities of "fraudulent debtors," and surely no one would argue that this desire, leaving aside the means employed, is not a constitutionally valid one. But even a glance at Sections 515 and 517 of the New York Correction Act makes it plain that any judgment debtor under body execution imposed by Section 764 can, if he has the means, escape the rigors of imprisonment (be it of itself constitutionally valid or not), and that if he has not the means, cannot. In short, the fraudulent debtor, the party who can pay the judgment, can escape confinement altogether simply by convincing a surety to split the risk with him, while the truly destitute debtor, in cases where the trial court's discretion was unwisely exercised in favor of imprisonment, suffers the confinement actually intended by the legislature for another.[2]

If any more need be said, petitioner refers the Court to its opinion in *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349 (1951). There, in striking down a municipal ordinance regulating the sale of milk and milk products, the Court observed that "reasonable and adequate alternatives [to the ordinance] * * * [were] available." *Id.* at 354. In the case at bar, too, "reasonable and adequate alternatives are available." See Section 903 of the Civil Practice Act (warrant of attachment against the defendant's property), Section 878 (temporary injunction), and Section 773 (examination in supplementary proceedings). See generally Note, 26 N. Y. U. L. Rev. 172, 179-80 (1951).

Thus, petitioner has shown that Section 764, when construed together with the "jail liberties" provisions, is self-defeating to an almost absurd extent. In view of the oppressive features of that Section, see Point III, *supra*, and in view of the alternatives available, there can be no escape from the conclusion that the enactment of Section 764 constituted a violation of the due process clause of the Fourteenth Amendment.

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2. See Section 510 of the New York Correction Law for the "jail liberties" in the various counties throughout the State. In the case of any prison situated in the city of New York, the defendant will find the prison walls extended to the boundaries of the city for the full term of imprisonment imposed, that is, six months or three months, depending on the sum sought to be collected. See Section 72 of the Civil Rights Law. For an able description of the New York "jail liberties" provisions generally, see Medina, *Shall New York Surrender Leadership in Procedural Reform?*, 29 Colum. L. Rev. 158, 168 (1929).

POINT V

Petitioner was denied the equal protection of the laws because Section 764, taken together with Sections 515 and 517 of the New York Correction Law, impeded petitioner, solely by reason of his financial inability, in the exercise of his right, in violation of the Fourteenth Amendment to the Constitution of the United States.

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. * * * In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. * * * Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law." *Griffin* v. *Illinois*, 351 U. S. 12, 16-17, 19 (1956).

Petitioner's present contention is that Section 764 and the "jail liberties" provisions in the Correction Law operate in such a way as to deprive him of the equal protection of the laws, one of his precious rights under the Fourteenth Amendment.

Again, as under Point III, the fundamental notions which underlie the thesis of petitioner's position can be found among the non-judicial as well as among the judicial authorities. Take, for example, Judge Medina's statement of the problem:

> "It was never intended that there should be one rule for the rich and another for the poor. And yet a person with means at his disposal or with friends or rela-

tives of means may lightly disregard the law as to arrest and body execution. * * * The poor man may be unable to procure such a [jail liberties] bond in which event he must remain in jail." Medina, *Shall New York Surrender Leadership in Procedural Reform?*, 29 Colum. L. Rev. 158, 168 (1929).

Or that of Thomas Herttell:

"True, the law by which bail, in the cases stated, is allowed, tend, in a degree, to lessen the hardships of the debtor, but do not go the length of restoring him to the full enjoyment of his natural, unalienable, and political rights. The mercies of those laws are only offered to those who happen to have friends oppulent [sic] enough to be their security, and thus ward off a while, the evils of a close confinement within the prison walls. That a debtor has friends, who are able and willing to stand between him and the unrestrained operation of the law of imprisonment for debt, is an accidental, adventitious circumstance, extraneous to the law, and which operates kindly, as far as it goes, on those who are fortunate enough to fall within its reach: but the debtor, however honest, who happens to be poor and friendless, can find in those laws of bail, no alleviation of his misfortunes; but, as before, is left unassisted, to sustain the full effects of that engine of oppression, by which, though guiltless of any crime, he is 'taken and imprisoned,' in direct violation of the bill of rights and constitution of the state." Herttell, *supra*, at 29-30.

Or that of Mr. Chief Justice Hughes:

"These apparently generous provisions were of little aid to the destitute. * * * Admission to the jail liberties was a great boon, but not within the reach of anyone who could not command a surety able to justify

> in twice the amount for which he had been held to bail, or which was due upon the execution. * * * But for the poor defendant who cannot give such bail there is no relief. He must remain in prison. * * *"

Hughes, *supra*, at 156-57, 169.

The law today is as contemptuous of financial discrimination in the administration of criminal justice as were its servants fifty and one hundred and fifty years ago. *Griffin* v. *Illinois*, *supra*, articulated for the first time the constitutional principle that a state may not impose financial obstacles in the path of free exercise by all of the rights granted them in respect of criminal prosecutions. A whole family of cases has already grown around the *Griffin* decision. See *Lane* v. *Brown*, 372 U. S. 477, 483-85 (1963); *Winters* v. *Ohio*, 370 U. S. 721 (1962); *Burns* v. *Ohio*, 360 U. S. 252, 257-58 (1959); *Eskridge* v. *Washington State Bd. of Prison Terms & Paroles*, 357 U. S. 214, 216 (1958). In *Smith* v. *Bennett*, 365 U. S. 708 (1961), the Court said:

> "While habeas corpus may, of course, be found to be a civil action for procedural purposes * * * it does not follow that its availability in testing the State's right to detain an indigent prisoner may be subject to the payment of a filing fee. * * * When * * * [a] right is granted by a State, financial hurdles must not be permitted to condition its exercise. *Id.* at 712-13."

See also *Gideon* v. *Wainwright*, 372 U. S. 335, 348 n.2 (1963) (due process clause); *Bearden* v. *United States*, 372 U. S. 252 (1963); *Elchuk* v. *United States*, 370 U. S. 722 (1962); *Bearden* v. *United States*, 304 F. 2d 532, 540-42 (5th Cir. 1962) (dissenting opinion of Judge Rives), *vacated*, 372 U. S. 252 (1963).

The Court of Appeals of New York has recognized the *Griffin* principle. See *People* v. *Stanley*, 12 N. Y. 2d 250, 252, 189 N. E. 2d 478, 479, 238 N. Y. S. 2d 935, 937 (1963); *People* v. *Pitts*, 6 N. Y. 2d 288, 291-93, 160 N. E. 2d 523, 524-26, 189 N. Y. S. 2d 650, 652-54 (1959); *People* v. *Breslin*, 4 N. Y. 2d 73, 77, 149 N. E. 2d 85, 87, 172 N. Y. S. 2d 157, 160-61 (1958); *People* v. *Kalan*, 2 N. Y. 2d 278, 280, 140 N. E. 2d 357, 358, 159 N. Y. S. 2d 480, 481 (1957).

Petitioner submits, however, that the case at bar presents a stronger one than did *Griffin* at the time of its adjudication in this Court: *Griffin* declared that a state may not condition *the exercise of a right granted to all*, the right to appeal a criminal conviction, on financial ability, whereas in the present controversy the New York jail liberties statutes are open to no construction other than that the existence in any given individual of *the right itself*, the right to avoid imprisonment for debt, is conditioned upon the amount of money at his disposal. Obviously such a discrimination constitutes a far greater imposition on the Constitution.

Were it to be suggested that the doctrine of the *Griffin* case and its progeny does not extend beyond rights in criminal proceedings, Petitioner would urge first that the holding in *Smith* v. *Bennett*, *supra*, is otherwise, and second, and more ardently, that Point III of the Argument established that the body execution system in New York can be styled criminal in all respects save that of the safeguards granted the debtor.

Similarly, it cannot be said that Petitioner's position entails the conclusion that statutes providing for the ordinary kinds of bail violate the equal protection clause, for bail is imposed in order to insure compliance by the de-

fendant with some future requirement, such as appearing for trial or surrendering for execution of sentence, while the jail liberties provisions grant the well-heeled judgment debtor complete relief from the requirement previously imposed.

In sum, Petitioner has shown that Section 764, taken together with the provisions in the New York Correction Law, deprived him of the equal protection of the laws because under the New York scheme only those who have available twice the amount of the judgment debt are granted the right to be admitted to the jail liberties, and this in violation of the Fourteenth Amendment to the Constitution of the United States.

POINT VI

Section 764 of the New York Civil Practice Act inflicted a cruel and unusual punishment upon petitioner, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioner's next contention is that imprisonment for debt, as an institution, carries with it so many connotations obnoxious to modern standards of decency that it must be invalidated as constituting a cruel and unusual punishment violative of the due process clause of the Fourteenth Amendment to the Constitution. See *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 462, 479 (1947) (majority and dissenting opinions).

Point III, *supra*, establishes that body execution is a punishment within the constitutional meaning of the word.

The history of the New York statute and two recent decisions of this Court preclude any other conclusion.

Therefore, as was said in *Trop* v. *Dulles*, 356 U. S. 86, 99 (1958):

> "The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment. *Id.* at 99."

Clearly the validity of any particular sanction will not be adjudicated by this Court on the basis of what was regarded as cruel and unusual punishment by the architects of the Constitution.

> "The Court [has] recognized * * * that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-01.

Hence Petitioner would suggest that "the evolving standards of decency" which have characterized the development of our country from its inception leave no room for imprisonment for debt. How can it possibly be maintained by any enlightened participant in the democratic experiment that throwing a man in jail because he cannot satisfy his creditors does not detract in very great measure from the grandeur of the living Constitution?[3]

All punishments which by their excessive length or severity are greatly disproportionate to the offenses charged violate due process. See *O'Neil* v. *Vermont*, 144 U. S. 323 (1892). Thus, in *Weems* v. *United States*, 217

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3. For a discussion of cruel and unusual punishment generally, see Note, 36 N. Y. U. L. Rev. 846 (1961).

U. S. 349 (1910), the Court condemned a Philippine statute providing for twelve to twenty years in jail for entry of a known false statement in a public record. The gross disparity between the offense and the punishment, especially when compared with the punishment for more serious crimes, made it cruel and unusual.

In *Trop* v. *Dulles, supra,* loss of citizenship resulting from court martial conviction of a wartime military deserter and subsequent dishonorable discharge, was held unconstitutional as being cruel and unusual punishment. This Court characterized it a form of punishment more primitive than torture.

A California statute making it a misdemeanor merely to be addicted to narcotics—although they were not used within the state and although there was no anti-social behavior there—was held unconstitutional under the Fourteenth Amendment on the theory that even one day in jail for such a "crime" would constitute the imposition of cruel and unusual punishment. *Robinson* v. *California,* 370 U. S. 660 (1962).

In view of the evils sought to be prevented, and the above *criminal* cases, it is apparent that section 764 does in fact impose cruel and unusual punishment. One can be incarcerated for merely owing a *civil* debt, when he has committed no crime against society, nor anyone else. It is possible that the judgment debtor could owe as little as ten dollars, or even less. The judgment (as here) can have been taken upon a default, and the order for body execution can have been issued completely *ex parte.*

In the *Robinson* case, *supra,* the Court observed that even one day's deprivation of liberty for the "crime" of merely being a narcotics addict, or for the "crime" of

having a common cold, was cruel and unusual. Under that rationale, is it not also cruel and unusual punishment to send a man to jail for the "crime" of being unable or unwilling to pay a civil judgment?

POINT VII

The New York State "body execution" statute violates the due process clause of the Fourteenth Amendment because it imposes involuntary servitude other than as punishment for crime.

The Thirteenth Amendment prohibits involuntary servitude "* * * except as a punishment for crime whereof the party shall have been duly convicted. * * *" But petitioner has never been convicted, duly or otherwise, of any crime.

However, once a body execution is ordered pursuant to section 764, the judgment debtor is incarcerated, solely in order to enforce the *civil* debt, just as surely and finally as one who has been found guilty after a formal criminal conviction for bank robbery. The difference between the two is merely one of duration and perhaps type of treatment; but the involuntariness of the servitude is exactly the same.

Therefore, incarceration of a judgment debtor in a civil jail pursuant to section 764 merely for owing a civil debt, is the imposition of involuntary servitude for something other than crime and without one's being duly convicted of crime. As such, it violates the due process clause of the Fourteenth Amendment.

In this connection the *Peonage Cases*, 123 Fed. 671 (M. D. Ala. 1903), are of interest. An Alabama statute,

directed at defaulting sharecroppers, provided criminal liability and imprisonment for farm workers and tenants who left their employment, breached their contracts, and became employees of others. The statute was held unconstitutional because it attempted to coerce payment of a purely civil liability arising out of breach of contract, by means of *criminal* proceedings. The case presently before this Court presents even a worse situation. Here, payment of a purely civil liability is sought to be coerced not even by a criminal law (with all the guarantees implicit therein), but by a civil law the result of which is a criminal incarceration. It would appear that the instant case is an *a fortiori* one to the *Peonage Cases.* See also *Bailey* v. *Alabama,* 219 U. S. 219 (1911); *United States* v. *Reynolds,* 235 U. S. 133 (1914).

Conclusion

Imprisonment for civil debt is as anachronistic as lopping off a hand for theft; or, under the Assize of Northampton (1176), a hand and a foot for forgery or arson. Certainly today it is unbecoming a free people for a judge to be able to say to a defendant in a civil case, involving a civil debt, that he either pay it all or go to jail. The final order which affirmed the granting of respondent's motion for an order directing the issuance of an execution against petitioner's person should be vacated.

Respectfully submitted,

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After this brief will have been filed, and on September 1, 1963, there will go into effect in New York a new Civil Practice Law and Rules (CPLR). Three different sections of the CPLR deal with body arrest which can take place *after* judgment: sections 5250, 6101, 6111.

Although the cross-reference table from the Civil Practice Act to the CPLR indicates that section 764 of the Civil Practice Act has been omitted, one is also instructed to compare CPLR sections 6101 and 6111. A study of sections 5250, 6101 and 6111 of the CPLR shows that all that really happened is that the New York legislature took Section 764 of the old Civil Practice Act and put it in different sections of the CPLR. Sections 5250, 6101 and 6111 of the CPLR follow:

> **"§5250. Arrest of judgment debtor**
>
> "Upon motion of the judgment creditor without notice, where it is shown that the judgment debtor is about to depart from the state, or keeps himself concealed therein, and that there is reason to believe that he has in his possession or custody property in which he has an interest, the court may issue a warrant directed to the sheriff of any county in which the judgment debtor may be located. The warrant shall command the sheriff to arrest the judgment debtor forthwith and bring him before the court. The sheriff shall serve a copy of the warrant and the papers upon which it was based upon the judgment debtor at the time he makes the arrest. When the judgment debtor is brought before the court, the court may order that he give an undertaking, in a sum to be fixed by the court, that he will attend before the court for examination and that he will obey the terms of any restraining notice contained in the order."

Appendix

"§6101. Grounds for arrest

"An order of arrest as a provisional remedy may only be granted:

"1. Where there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit, and the person to be arrested is not a woman; or

"2. Where the plaintiff has demanded and would be entitled to a judgment or order requiring the performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt and where the defendant is not a resident of the state or is about to depart therefrom, by reason of which non-residence or departure there is danger that such judgment or order will be rendered ineffectual."

"§6111. Order of Arrest

"An order of arrest as a provisional remedy may be granted, in the discretion of the court, without notice, before or after service of summons and at any time before or after judgment. It shall specify the amount of bail, be indorsed with the name and address of the plaintiff's attorney and be directed to the sheriff of any county in which the defendant may be located. The order shall command the sheriff to arrest the defendant forthwith, keep him in custody and bring him before the court, in the county where the arrest is made, for a hearing within a time specified in the order, not exceeding forty-eight hours, exclusive of Sundays and public holidays, from the time of the arrest."

Section 5250 deals with arrest *after* judgment of a judgment debtor if he is about to leave the state or is hiding

within the state, if there is reason to believe he has property sufficient to pay all or part of the judgment.

Section 6101 provides for arrest as a *provisional remedy* in cases of fraud or deceit, conversion of personal property, or where plaintiff can win a judgment calling for performance of an act. Section 6111 provides that the order of arrest *as a provisional remedy* can be granted even *after* judgment.

Under section 764 of the Civil Practice Act, application was by the judgment creditor. Under Rule 6112 of the CPLR it still is. Under section 764 (via Section 826) body execution could be had in cases inter alia of fraud, deceit, and conversion of personal property. The same is true under section 6101. Under section 764 issuance was in the court's discretion. The same is true under section 6111. Under section 764 application was without notice. So it can be under section 6111. Most important, under section 764 body execution occurred *after* judgment —now, under section 6111, a judgment debtor can be arrested *still after judgment.*

Indeed under the new CPLR, civil arrest can be had *after* judgment, not only under one section, but under more than one: sections 5250, 6101 and 6111. To one who is jailed after September 1, 1963 pursuant to sections 6101 and 6111, it makes little difference that the incarceration is termed a "provisional remedy". He is still imprisoned in a civil action.

Moreover, the legislature's euphemistic nomenclature of arrest *after* judgment being a "provisional remedy" is both a contradiction in terms and totally inconsistent with the other real provisional remedies.

Appendix

What is provisional about being arrested after judgment? How does it keep one, or one's property, within the jurisdiction pending the outcome of the trial, so as to be amenable to the outcome? How is it to be equally compared to an attachment, sequestration, receivership or even an arrest *before* or during trial?

Regardless of what it is called—a provisional remedy or otherwise—and without the necessity of going into legislative intent vis-a-vis what happened to the prior section that was *numbered* 764, it is perfectly clear that under the new CPLR a judgment debtor can be jailed merely because he owes a civil debt. He can be jailed in the same manner, in the same place, by the same people, and for the same period of time.

The exact same deprivation of liberty exists whether or not he is jailed pursuant to what is nicely called a "provisional remedy."

Sections 6101 and 6111 are merely new combinations of the old law! Arrest after judgment under old section 764, and arrest before judgment under old section 818 are now both found in 6111—regardless of what it is called.

As to effective date, as well as effect on pending and subsequent proceedings, the new CPLR provides:

"§10003. Pending and subsequent proceedings

"This act shall apply to all actions hereafter commenced. This act shall also apply to all further proceedings in pending actions, except to the extent that the court determines that application in a particular pending action would not be feasible or would work injustice, in which event the former procedure applie-

Appendix

Proceedings pursuant to law in an action taken prior to the time this act takes effect shall not be rendered ineffectual or impaired by this act."

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"§10005. Effective date

"This act shall take effect September first, nineteen hundred sixty-three."